

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

**SUPREME JUDICIAL COURT
No.**

**APPEALS COURT
No. 2021-P-0693**

COMMONWEALTH

v.

JORGE L. DELGADO-RIVERA

APPLICATION FOR DIRECT APPELLATE REVIEW

Now comes the defendant/appellant, Jorge Delgado-Rivera, in the above-entitled matter and applies, pursuant to Mass. R. App. P. 11, for direct appellate review of his conviction out of the Malden District Court and subsequent post-trial denial of his Motion for a Required Finding of Not Guilty, pursuant to Mass. R. Crim. P. 25(b)(2). The grounds for this application are set forth in the accompanying memorandum of law.

Dated: August 19, 2021

Respectfully submitted;
Jorge L. Delgado-Rivera
By his Attorney,

/s/Michael Bencal

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v.

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**SON OF THE APPELLANT'S NAME HAS BEEN IMPOUNDED AND HE IS REFERRED
TO AS C D M HEREIN**

**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR DIRECT
APPELLATE REVIEW**

Now comes the defendant/appellant, Jorge Delgado-Rivera, in the above-entitled matter and submits this memorandum of law in support of his application, pursuant to Mass. R. App. P. 11, for direct appellate review. For the reasons set forth herein, his application should be granted.

STATEMENT OF PRIOR PROCEEDINGS

Complaint number 1650 CR 002801 issued out of the Malden District Court and alleged that the defendant/appellant, Jorge Delgado-Rivera, committed the following five offenses:²

1. possession with intent to distribute a class D drug, in violation of G.L. c. 94C §32C;
2. possession of counterfeit notes, in violation of G.L. c. 267 §12;
3. possession of ammunition without and FID card (one .22 caliber round), in violation of G.L. c. 269 §10;
4. possession of ammunition without and FID card (twelve .38 caliber rounds), in violation of G.L. c. 269 §10; and
5. possession of ammunition without and FID card (one .9mm round), in violation of G.L. c. 269 §10.

These charges resulted from contraband seized during a warrant search of 84 Bow Street, Everett in connection with a report of a shooting. (Tr. III:64-65, 96, 123, 126).¹

Mr. Delgado-Rivera challenged the propriety of this search by moving for suppression on the grounds that the warrant issued absent probable cause. However, the trial court, (Archilla, J. presiding) denied this motion, (Add. 2-4, Tr. I:45) and a subsequent motion for reconsideration of the denial was later denied. (Tr. II:18). Thereafter, a Single Justice of the Supreme Judicial Court denied interlocutory review and the case proceeded to trial.

¹ Five volumes of transcripts have been filed with the Appeals Court and the citing here is by volume and page such as (Tr. __ : __).

Prior to trial, on January 14, 2019, the trial court, (Barnes, J., presiding), allowed the defense's motion for a required finding of not guilty on Count 2, the charge of possession of counterfeit notes. (Tr. IV:141-142). A jury trial commenced thereafter and, on January 15, 2019, at the close of the Commonwealth's case, the court entered a required finding of not guilty on Count 1, which alleged possession of marijuana with intent to distribute and Counts 4 and 5, which alleged possession of ammunition without an FID card. (Tr. IV:33-37). The trial judge denied the defense's motion for a required finding of not guilty on Charge 3, which alleged the unlawful of possession of the .22 caliber bullet without an FID card. (Tr. IV:35). Later, that same day, the jury found Mr. Delgado-Rivera guilty on this charge and the court sentenced him to ninety days in the house of corrections, deemed served. Mr. Delgado-Rivera filed a timely notice of appeal from his conviction on January 18, 2019, he filed a timely notice of appeal and on June 22, 2021 a notice of consolidated appeal was filed with the Malden District Court.

At the close of trial, the trial exhibits were placed into the custody of the prosecution. (See Appendix *infra* at 55). On December 7, 2020, undersigned appellate counsel requested copies of Trial Exhibit 7, (assorted mail), but was told that the exhibit could not be located. (See Appendix *infra* at 102, 112, 115,

117). Accordingly, counsel filed with the Malden District Court “Defendant’s Motion for Postconviction Relief, pursuant to Mass. R. Crim. P. 30(b) and Mass. R. Crim. P. 25(b)(2)” on March 7, 2021. (See Appendix *infra* at 56). Therein, two claims were argued: (1) that the loss of the trial exhibit required that Mr. Delgado-Rivera’s convicted be vacated and a not guilty entered in his favor and (2) that the evidence presented on the record was insufficient to sustain his conviction. However, on March 22, 2021, the Office of the Middlesex District Attorney notified counsel that the exhibit had been located and, upon allowed motion, returned Trial Exhibit 7 to the trial court. (See Appendix *infra* at 121).

As a result, on April 14, 2021, counsel filed the following in the trial court: (1) “Notice of Withdrawal of Claim 1 and Filing of Supplemental Memorandum of Law in Support of Claim 2 of Defendant’s “Motion for Postconviction Relief Pursuant to Mass. R. Crim. P. 30(b) and Mass. R. Crim. P. 25(b)(2)” and (2) “Supplemental Memorandum of Law in Support of Claim 2 for Relief From Conviction by Insufficient Evidence in Accordance With Mass. R. Crim. P. 25(b)(2).” (See Appendix *infra* at 123 and 130). On May 20, 2021, this matter was heard by Judge Barnes and Mr. Delgado-Rivera’s motion was denied. (See Appendix *infra* at 164).

This case was entered in the Appeals Court on August 4, 2021 and his Brief and Record Appendix was filed contemporaneous with the filing of the instant application.

STATEMENT OF THE FACTS

The charges related to this case stem from an incident that occurred at approximately 6:00 p.m. on December 7, 2016 when three gunshots were reported fired in the vicinity of 84 Bow Street, Everett. (Tr. III:42, 46, 51, 58, 123). Maritza Rivera, Mr. Delgado-Rivera's wife, and the couple's teenage son, Steven, were ordered out of the home by police. (Tr. III:42). Then, only after police had responded, Mr. Delgado-Rivera arrived on the scene "frantic" and fearful for the safety of his wife and son. (Tr. III:43-44). All were uninjured. (Tr. III:44). Their other son, C D M, was not home at the time and his father stated that he was in Chelsea at Floramo's Restaurant.

The police found physical evidence outside the home of what they believed was related to the gunshots heard that night. In particular, "[t]hey found a green 2007 Lexus... with an apparent bullet hole in the rear passenger side quarter panel." (Tr. III:45). "Officers also located two apparent bullet holes on the front porch" of 84 Bow Street; "[o]ne of the holes was located on the front wall of the porch; the second hole was located on the side wall of the

porch.” (III:60). The police surmised that “[t]he pattern of the holes indicate that the shooter was traveling north on Bow Street towards 84 Bow Street when the shooting began.” While searching around that location, “officers located an apparent bullet hole in the building directly across the street from 84 Bow Street, 79 Bow Street” and “[u]pon further inspection, officers also located copper jacketing from a bullet on the sidewalk directly under the bullet hole.” Detective Michael J. Lavey, while not a stated expert in ballistics or relevant criminology, conjectured that “[t]he bullet hole in [79 Bow Street] is consistent with a shot being fired from 84 Bow Street, possibly indicating that someone in 84 Bow Street exchanged gunfire with the suspect vehicle.”

The police believed that this shooting occurred in the context of a gang dispute between the “Blaka Boys” and “The Money Gang,” hereinafter referred to as “TMG,” for which they believed C D M was an associate. (Tr. I:12, 21, 40, 41, 42). In particular, in the search warrant application they alleged:

Since October 30, 2016, Everett police officers have responded to several shooting incidents around the city. On October 30, 2016 officers and investigators responded to 84 Bow Street for a report shots fired at the residence. Investigators recovered a single bullet from the exterior wall of the building. During the course of that investigation, Det. Nick Crowell viewed security video from cameras attached to the exterior of 84 Bow Street that captures footage from

the street. These cameras belong to the occupants of the home. During the investigation it was learned that C D M of 84 Bow Street was involved in an incident where a motor vehicle was vandalized at 15 Fuller Street in Everett. Video evidence was recovered that shows a motor vehicle known to be operated by C D M(a black 2000 Audi registered to his mother) transported the people that vandalized a black Toyota Camery [sic] belonging to a resident of 15 Fuller Street. It was further discovered that C D M is associated with a group named "The Money Gang" (herein referred to as "TMG"). The residence at 15 Fuller Street is home to Dimitri Duvnard and Demetrius Case, both of whom are associated with a group named the "Blaka Boys." The ballistic evidence recovered from the building was sent to the state crime lab and the case is still being investigated...

Since October 30, officers have responded to reports of shots fired on five other occasions with the most recent shooting occurring on December 6, 2016. During this incident, 3 shots were fired at 68 Francis Street, the home of Jahkeal Trevaughn Browne (DOB: ...), a known associate of "TMG". The investigation in to this shooting revealed video evidence which shows a silver motor vehicle with MA plates attached, drive by the home and shoot 3 rounds of ammunition at it. One vehicle that was unoccupied and parked at the corner of Francis Street and Union Street was hit by a bullet through the windshield with the bullet lodging in the rear wheel well. It was towed to the Everett police station for processing by the MA state police crime scene services...

The police believed that these prior events were connected to December 6, 2016 shooting in the vicinity of 84 Bow Street. Specifically, they obtained security footage from a nearby auto body that simply depicted a silver colored sedan driving down Bow Street just before the shooting there on December 6, 2016. They alleged that it "matches the shape and description of the vehicle

involved in the shooting at 68 Francis Street[,]” as discussed above. In addition, the police alleged that “[a]pproximately 20 minutes before the shots were fired in to 84 Bow Street, Chelsea police reported a shooting incident in their jurisdiction involving in a silver motor vehicle and a black motor vehicle, it is unknown at this time [December 7, 2016] if these shootings connected but the description of the vehicles are similar.”

The occupants of 84 Bow Street did not consent to the search of their home. (Tr. III:61). A previous protective sweep did not uncover any additional persons present, firearms, ammunition, or contraband inside the home. (Tr. III:48-49). However, the building was frozen pending the application for a warrant. A warrant was also sought to search the Lexus with the bullet. In specific to the application for 84 Bow Street, Detective Lavey sought “[e]vidence of the crimes of discharging a firearm ... unlawful possession of a firearm ... and unlawful possession of ammunition[,]” which specifically included firearms and their components, live and spent ammunition, “any documents showing custody and control of the premises[,]” and “storage media attached to the home security system, including computers, hard drives, or wireless network storage devices.” (Tr. I:5, 13, 19, 20, 22, 30, 37, 3:61). He stated that the purpose of the search is to seize firearms, custody and control

documents for the premises, spent ammunition, and storage media for the home security system. Because Detective Lavey did not know how, or where, the video is recorded, he extended the storage media request to include computers or wireless storage devices. In the application to search the Lexus, he sought “storage media attached to the home security system.”

After the allowance of the warrants, the police searched the entirety of 84 Bow Street, a single-family home. (Tr 3:63). Detective Lavey searched the “master” bedroom, which is located on the second floor, and found a DVR system in the closet, one .22 caliber rifle bullet on a nightstand, twenty-dollar bills, and a money counter. (Tr. III:64, 91, 97, 99). He also searched a second bedroom in which he found paperwork belonging to Steven Delgado. (Tr. III:88). He additionally recovered from this bedroom a digital scale, two boxes of sandwich bags, a laser site for a firearm, a wallet containing \$820.00, a black bag with \$1400.00 in it, thirty-four .30 caliber bullets, plastic bags with the corners tied off, and an eyeglass prescription for C D M. (Tr. III:88, 89, 99). In a third bedroom, Detective Lavey and Lieutenant Paul Strong retrieved marijuana, and two boxes of sandwich bags. (Tr. III:90, 92, 126, 131). In addition, the police recovered \$24,000.00 from a safe in the basement. (Tr. III:91). They also ammunition from behind a first-floor painting, (Tr. III:100), and

a 9mm bullet behind a clock in the kitchen along with a purse with \$1500.00 inside it. (Tr. III:123-124, 128, 129, 134).

No paperwork or personal items for Jorge Delgado-Rivera were seized from these rooms and admitted in evidence at trial.

The following facts center on the contents of Trial Exhibit 7 as it was returned to the trial court from the Middlesex County District Attorney's office. In specific, this exhibit includes the following pieces of mail recovered by the police from the search of 84 Bow Street, Everett, Massachusetts²:

- Sixteen promotional advertising cards for "Moda Fashion" of which ten were original and six were copies.
- Opened envelope containing promotional material and addressed to Jorge Delgado, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads "PRSRT STD U.S. POSTAGE PAID COMCAST."
- Unopened envelope from Comcast addressed to Jorge Delgado, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads "PRESORTED FIRST-CLASS MAIL U.S. POSTAGE PAID CSG Mail Services."
- Unopened envelope from Comcast addressed to Jorge Delgado, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads "PRESORTED FIRST-CLASS MAIL U.S.

² Testimony at trial, by Detective Lavey, indicated that the mail found in the hallway included mail addressed to "Maritza Delgado." However, when the Middlesex County District Attorney's office returned this trial exhibit to the trial court no mail addressed to "Maritza Delgado" was included. (Tr. III:94-95)

POSTAGE PAID CSG Mail Services.”

- Unopened envelope from Bank of America addressed to Jorge L. Delgado-Rivera, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads “PRESORTED FIRST-CLASS U.S. POSTAGE PAID KRB.”
- Unopened envelope from P.O. Box 9440, Trenton, N.J. 08650-9440, addressed to Jorge Delgado-Rivera, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads “PRESORTED FIRST-CLASS MAIL U.S. POSTAGE PAID BROOKLYN, N.Y. PERMIT NO. 1825.”
- Unopened envelope from P.O. Box 203, Milford, MA 01757 addressed to Jorge L. Delgado-Rivera, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads “PRESORTED FIRST-CLASS MAIL U.S. POSTAGE PAID MILFORD, MA PERMIT NO. 43.”
- Unopened envelope from P.O. Box 203, Milford, MA 01757 addressed to Jorge L. Delgado-Rivera, 84 Bow Street, Everett, MA without any postmark or other dating and where the postage mark reads “PRESORTED FIRST-CLASS MAIL U.S. POSTAGE PAID MILFORD, MA PERMIT NO. 43.”
- Unopened envelope the Rawlings Company LLC addressed to Jorge L. Delgado, 84 Bow Street, Everett, MA containing a bar code of “598635145 6 IKY-NP1 02149” but without any postmark or other dating and where the postage mark reads “PRESORTED FIRST-CLASS POSTAGE PAID LOUISVILLE, KY PERMIT #879.”
- Opened envelope sent by certified mail, and requiring signature confirmation of receipt, by Jonathan Blodgett, Essex District Attorney, Ten Federal Street, Salem, MA 01970 to Jorge Delgado-Medina, 84 Bow Street, Everett, MA which bears \$7.36 in postage dated September 29, 2016 and “mailed from zip code 01970.” The signature confirmation card is still affixed to the envelope.

Indeed, the only paperwork found in the residence attributable to Mr. Delgado-Rivera was mail addressed to him and found on a common hallway table. (See Appendix *infra* at 152, 156, 158, 160; Tr. III:125, 132, 133). There no evidence presented as to the postmarks on this mail or any other evidence that would have revealed the recency of this mail.

Mr. Delgado-Rivera was not charged with the contraband found in the second and third bedrooms. He was charged with possession of ammunition found in the kitchen clock, ammunition discovered inside the first-floor painting, as well as marijuana and alleged counterfeit notes found in the “master” bedroom; but found not guilty by a required finding of not guilty on each of these allegations. Mr. Delgado-Rivera appeals from his conviction for possessing the single .22 caliber bullet found in the “master” bedroom. (See Appendix *infra* at 42).

STATEMENT OF ISSUES OF LAW
RAISED ON DIRECT APPEAL

Mr. Delgado-Rivera filed a timely appeals from both his conviction after a jury trial and the trial court's post-trial denial of his motion, pursuant to Mass. R. Crim. P. 25(b)(2), to vacate and reverse his conviction. The related issues on appeal are as follows:

- I. whether the trial court erred in not suppressing evidence seized, pursuant to a warrant, at 84 Bow Street because probable cause did not exist to search the residence for (1) evidence of a shooting as there was no nexus between the interior of the home and the shooting outside and (2) security camera recording equipment as the magistrate was not presented with evidence to believe that it was stored there or that it was even owned or controlled by Mr. Delgado-Rivera, and
- II. whether Mr. Delgado-Rivera's conviction for being in constructive possession of the single .22 caliber bullet seized from the "master" bedroom should be reversed because the Commonwealth failed to prove, beyond a reasonable doubt, that he knew of this small round which was not even detected by the police during their protective sweep, let alone, had the intent and ability to exercise dominion and control over it in the absence of evidence of clothing, papers, or personal effects in that room.

These claims were preserved by timely motions to suppress evidence and for required findings of not guilty at trial and, thereafter, pursuant to Mass. R. Crim. P. 25(b)(2). As discussed below, the matters inherent to these claims related to conviction based upon unconstitutionally seized evidence and absent

proof beyond a reasonable doubt are “of such public interest that justice requires a final determination by the full Supreme Judicial Court[;]” otherwise, the constitutional rights of our residents will be eroded. Mass. R. App. P. 11(a).

ARGUMENT

- I. This Court should hold that the Everett Police affidavit, submitted in support of the search warrant application, was insufficient as it fails to establish Detective Lavey’s basis of knowledge of the video recording system, his expertise in video recording systems, expertise in ballistics and presents a mere possibility that probable cause exists that ammunition and/or guns would be found on the property and thus order the suppression of all items seized by the police from 84 Bow Street on December 7, 2016.**

The Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights require that a search warrant should only issue upon probable cause. See M.G.L. c. 276 § 1; see also *Commonwealth v. Valerio*, 449 Mass. 562, 566 (2007); *Commonwealth v. Upton*, 394 Mass. 363 (1985). Probable cause to believe evidence of criminal activity will be found in a particular place must be demonstrated by disclosing a “nexus” between the crime alleged and the place to be searched. *Commonwealth v. JeanCharles*, 398 Mass. 752, 757 (1986); see also *Commonwealth v. Matias*, 440 Mass 787, 794 (2004). “The commission of a

crime in itself will not provide probable cause to search the suspect's home."

Commonwealth v. McDermott, 448 Mass. 750, 768 (2000); see also

Massachusetts v. Cinelli, 389 Mass. 197, 213 cert. denied (1993).

("[i]nformation establishing that a person is guilty of a crime does not necessarily constitute probable cause to search the person's residence.").

Illegal activity outside of the home, does not provide sufficient probable cause to search the inside of the home. *Commonwealth v. Bookman*, 77. Mass. App. Ct. 546, 550 (2010).

To establish probable cause, the search warrant application "affidavit must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity, and that they reasonably may be expected to be located in the place to be searched." *Cinelli*, 389 Mass. at 213. It is paramount that probable cause be shown in the affidavit through sufficient, particularized detail of the underlying circumstances "if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." *Commonwealth v. Reddington*, 395 Mass. 315, 325 (1985); quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965). "While 'definitive proof' is not necessary to meet this standard, the warrant application may not be based

upon mere speculation.” *Holley*, 478 Mass. at 521; quoting *Commonwealth v. Augustine*, 472 Mass. 448,455 (2015).

The issue here is whether probable cause existed at the time of the application for a warrant to search 84 Bow Street for evidence of gun activity that took place **outside** on the street. In *Commonwealth v. Pina*, 453 Mass. 438 (2009), this Court stated that probable cause is not established just because a crime may have been committed outside the home. A nexus between the crime and the place to be searched must be established. Yet, Detective Lavey’s search warrant application and associated affidavit failed to point to any specific facts, or probabilities, that shots came from inside 84 Bow Street. He avers that “[t]he bullet hole in this building [79 Bow Street] is consistent with a shot being fired from 84 Bow Street towards the street, **possibly** indicating that someone in 84 Bow Street exchanged gunfire with the suspect vehicle.” (Emphasis Supplied.) (Affidavit for search warrant 1650SW0192). Accordingly, the detective acknowledges that while the bullet is “consistent” as coming from the direction of 84 Bow Street, he concedes that it is only “possible,” not probable, that any alleged shot came from inside 84 Bow Street. (Affidavit for search warrant 1650SW0192). Detective Lavey could only speculate as he could

not rely on any eyewitnesses or forensic evidence as neither of which were evidenced.

Detective Lavey's conclusion is further eviscerated by the police's own investigation. The detective noted "officers received a radio dispatch for a report of the sound of three gunshots in the area of Bow Street." (Affidavit for search warrant 1650SW0192). Upon investigating, police found evidence of the three gunshots: a bullet in a green 2007 Lexus RX350 and two bullet holes in the front porch of 84 Bow Street. (Affidavit for search warrant 1650SW0192). Detective Lavey even concluded that they were made by the shooter in the silver sedan traveling north on Bow Street. (Affidavit for search warrant 1650SW0192). However, despite the fact that the police recovered evidence of the three gunshots, Detective Lavey still opined that the bullet lodged in 79 Bow Street originated from this inside the residence. (Affidavit for search warrant 1650SW0192). However, Detective Lavey's speculation on the how the fourth bullet arrived is not good enough to establish probable cause. *Commonwealth v. Woods*, 466 Mass. 707, n.8 (2014).

The search warrant application for 84 Bow Street also sought "storage media attached to the home security system, including computers, hard drives, attached or wireless network storage devices." (Affidavit for search warrant

1650SW0192). Detective Lavey premised this request upon the assertion that “I know from previous experience that 84 Bow Street has security video surveillance that captures footage of Bow Street.” (Affidavit for search warrant 1650SW0192). Still, he did not provide any detail regarding the basis for the belief the occupants controlled the security system or why storage media would be inside 84 Bow Street rather than internet based and located remotely.

Detective Lavey failed to attest how his observations, or any unknown specialized training, afforded him the basis to believe that the video recording device would probably be found at 84 Bow Street *Commonwealth v. Santiago*, 66 Mass. App. Ct. 515, 519-520 (2006). The detective not only lacked any knowledge of the location of the recording system, but also didn’t know the manner in which the video was recorded and storage medium. In the era of the internet, given the multitude of options available to memorialize video, the recording device would have been as likely to be found at a remote location as it could have been at 84 Bow Street.

As a result, his affidavit lacks factual statements that would lead one to “fairly believe” the location contained evidence of a crime. *Commonwealth v. Anthony*, 451 Mass. 59, 72 (2008). Accordingly, the vacatur of Mr. Delgado-

Rivera's conviction and reversal of the trial court's order on his motion to suppress is warranted because, taken as a whole, the application fails to "establish a 'substantial basis for concluding that evidence connected to the crime will be found,'" inside 84 Bow Street. *Commonwealth v. Perkins*, 478 Mass. 97, 104 (2017), quoting *Commonwealth v. Tapia*, 463 Mass. 721, 726 (2012).

- II. This court should vacate Mr. Delgado-Rivera's conviction as the trial court erred in denying his motions for a required finding of not guilty as the Commonwealth failed to prove beyond a reasonable doubt that he possessed any knowledge of the bullet, for which he was convicted of constructively possessing, nor did the Commonwealth prove beyond a reasonable doubt that he was able to exercise dominion and control over the room in which the bullet was found when none of his papers, clothing, or possessions were found in that room.**

"[C]onvictions based on insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice." *Commonwealth v. Heywood*, 484 Mass. 43, 49 n.7 (2020), quoting *Commonwealth v. Melton*, 436 Mass. 291, 294 n.2 (2002). Therefore, at the heart of this review is whether, in the light most favorable to the Commonwealth, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Doucette*, 408 Mass. 454, 456 (1990); quoting from *Latimore*, 378 Mass. at 674. Here, as detailed below, the

Commonwealth failed to meet this burden because it could not establish that Mr. Delgado-Rivera both knew of the bullet in the “master” bedroom and had the intent to exercise dominion and control over it in the absence of a personal nexus or incriminating evidence of any kind.

Proof of constructive possession requires the Commonwealth to show ‘knowledge coupled with the ability and intention to exercise dominion and control.’” *Commonwealth v. Boria*, 440 Mass. 416, 418 (2003), quoting *Commonwealth v. Brzezinski*, 401 Mass. 405, 409 (1989). Mere presence where contraband is found is insufficient to show “‘knowledge, power, or intention to exercise control over the [contraband].’” *Commonwealth v. Woods*, 94 Mass. App. Ct. 761, 765-66 (2019), quoting *Commonwealth v. Schmieder*, 58 Mass. App. Ct. 300, 303 (2003).

“A number of indicators may demonstrate knowledge by the defendant – ownership or control of the place where the contraband is found, whether other parties were present, “whether the contraband was in plain view or hidden, the demeanor of the defendant, including whether he took any evasive actions.” *Commonwealth v. Santana*, 95 Mass. App. Ct. 265, 268 (2019). Knowledge is not based upon what an individual should have known, but what

he actually knew at the time of the event. *Commonwealth v. Boris*, 371 Mass. 309, 315 (1944).

During the trial, Detective Lavey was asked if he could tell if Mr. Delgado-Rivera ever handled the bullet, he responded, "I couldn't." (Tr. III:105).

Detective Lavey was then asked if the bullet was checked for fingerprints to which he replied, "I don't believe so." (Id.). The detective also denied doing any testing on this bullet. (Tr. III:103). Upon further examination, Detective Lavey was asked if he knew when the bullet was placed in the bedroom or by whom to which he simply replied, "no." (Tr. III:98). This detective was unable to say that Mr. Delgado-Rivera even knew that the bullet was in the room. (Tr. III:98). Even Officer Goncalves was asked if he saw Mr. Delgado-Rivera with any bullets, to which he responded, "no sir." (Tr. III:55).

Testimony was not offered as to when Mr. Delgado-Rivera was last at 84 Bow Street or when the police last observed him at the address. All the officers were able to testify was that at some point **in the past** Mr. Delgado-Rivera resided at 84 Bow Street. (Tr. III:106). Then, there was not any testimony that clothing, personal papers, or other personal items of Mr. Delgado-Rivera were found in the house, let alone as in the same room as the bullet.

Knowledge of the contraband may be inferred where it is found in plain view. *Commonwealth v. Albano*, 372 Mass. 132, 135 (1977). However, here, the bullet was not found during the protective sweep of the home, nor was there any testimony that the bullet was found in plain view. (Tr. III:44, 48-49).

The demeanor of the defendant can also be a sign of knowledge. *Santana*, 95 Mass. App. Ct. at 268. Here, Mr. Delgado-Rivera did not try to run from the scene, but he went **TO** the scene “frantic” in an attempt to check on the well-being of his family. (Tr. III:44, 46). Mr. Delgado-Rivera never attempted to enter the home (Tr. III:62, 127), never argued with police officers, never gave the police a false name or address, nor sought to elude the police. *Santana*, 95 Mass. App. Ct. at 265.

Regarding mail found in the common hallway, the majority cannot be linked to the defendant, Mr. Jorge L. Delgado-Rivera. (*Supra* at 11 – 12). None of the mail addressed to him is dated or opened, leaving the possibility that it had been there for an extended period of time. (See Appendix *infra* at 140 - 160). The only dated piece of mail is an envelope from the Essex County District Attorney addressed to someone other than Mr. Delgado-Rivera and postmarked seventy days earlier. (See Appendix *infra* at 161-163). There is no way of knowing when this mail was placed in the common hallway or by whom.

Accordingly, as the Commonwealth was unable to establish beyond a reasonable doubt, knowledge, as well as the ability to exercise dominion and control over the single round of ammunition, this Court should vacate Mr. Delgado-Rivera's conviction and remand the matter for entry of a judgment of not guilty.

REASONS WHY DIRECT APPELLATE REVIEW
IS APPROPRIATE

Direct appellate review is appropriate because this matter raises questions of public concern that are best answered by the Supreme Judicial Court as it relates to the wrongful expansion of searches of dwellings and the requisite proof necessary for conviction of contraband by constructive possession. First, this Court should accept this case to stop the unlawful expansion of searching into dwellings simply because an event occurred outside. This Court, as stated above, has made it clear that a search warrant affidavit must contain enough **FACTS** to establish a nexus between the place to be searched and the crime. Yet, in this matter, all the affiant presents is speculation and a hunch of the presence of contraband contained in a building. He offers no basis of knowledge, no expertise, or no third-party observations to

substantiate his conjecture that either ammunition, guns, or home security recording devices would be found on the property. This case stands apart from our jurisprudence drawing a bright-line between an incident occurring outside a dwelling and the probable cause necessary to enter therein lawfully. See *Commonwealth v. Perkins*, 478 Mass. 97, 104 (2017), quoting *Commonwealth v. Tapia*, 463 Mass. 721, 726 (2012) (in applying for a search warrant, police are required to “establish a ‘substantial basis for concluding that evidence connected to the crime will be found’”).

Conviction for constructive possession of the single bullet is equally troubling and touches on our right to be acquitted absent proof beyond a reasonable doubt as guaranteed by our state and federal constitutions. The only evidence the Commonwealth could offer was that a few pieces of undated mail, addressed to Mr. Jorge Delgado-Rivera, were found in a common hallway. It was never shown that he possessed keys to the house, *Commonwealth v. Guerro*, 357 Mass. 741 (1970), that he regularly received mail there *Commonwealth v. Humphries*, 76 Mass. App. Ct. 702 (2010), that his driver’s license and/or registration listed 84 Bow Street as his address, G.L. c. 90 §1A, that anyone (including the police) saw him recently coming and going *Commonwealth v. Hernandez*, 439 Mass. 688 (2003), or that he was even

present therein at the time of the shooting. All the police could offer is that they knew he lived there in the past. While Mr. Delgado-Rivera may have lived at 84 Bow Street in the past, and received mail there in the past, there was no evidence to support that he either currently resided there or even as to when he was last inside that house.

The case at hand takes all the factors, from the various precedent setting decisions on constructive possession, and combines them into one matter. Should the lower court's ruling be allowed to stand, the long-held standard for proving constructive possession will not simply be eroded but will be obliterated. No longer would the Commonwealth need to demonstrate that the defendant possessed knowledge, coupled with ability to exercise dominion and control over the contraband, by offering incriminating evidence such as the presence of a defendant's clothing, *Commonwealth v. Hamilton*, 83 Mass. App. Ct. 406 (2013), contemporaneous papers attributable to the defendant, *Commonwealth v. Lee*, 2 Mass. App. Ct. 700 (1974), or other possessions of the defendant found with the contraband, *Commonwealth v. Ortega*, 441 Mass. 170 (2004). Here, there are no papers that could be deemed to be contemporaneous attributable to the defendant nor were any of his possessions found in the home.

As a result, direct appellate review should be granted in the public interest to ensure that justice is well served not only for Mr. Delgado-Rivera but for the public at large and to bolster the confidence in a fair judiciary that protects our rights to be free from unreasonable searches and seizures and convictions obtained by insufficient evidence.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Honorable Court should allow Mr. Delgado-Rivera's application for direct appellate review.

Dated: August 19, 2021

Respectfully submitted;
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By his Attorney,

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CERTIFICATE OF COMPLIANCE WITH RULES

I, Michael Bencal, certify pursuant to Mass. R. App. P. 11, that the foregoing application for direct appellate review complies with the applicable rules of court that pertain to the filing, including but not limited to Rule 20(a) and Rule 16(k). The document was produced Calibri font at 14 point using Microsoft word 2016 and containing 1992 nonexcludable words in the part of the brief required by Rule 16(a)(3)-(9).

/s/Michael Bencal

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CERTIFICATE OF SERVICE

I, Michael Bencal, hereby certify that I have served the Application of Direct Appellate Review and this Certificate of Service upon opposing counsel for the Commonwealth via the Court's electronic filing system to:

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Signed under the pains and penalties of perjury this 19th day of August, 2021.

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